In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 295

CLARENCE C. ELMORE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3A–15A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1970 (Pet. 2). The time for filing a petition for a writ of certiorari was extended by the Chief Justice to June 20, 1970 (Pet. App. 17A) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below correctly concluded that petitioner was not deprived of a fair trial by reason of the prosecutor's remarks in closing argument.

2. Whether petitioner was deprived of a fair trial because the government, in order to protect a witness from possible intimidation, did not inform petitioner of a possible source of information to rebut the witness's testimony until after the witness had testified.

STATEMENT

Petitioner, a former sheriff and former liquor commissioner of the State of West Virginia, was charged in a two-count indictment with having willfully attempted to evade the federal income taxes owed by him for the years 1962 and 1963, in violation of Section 7201 of the Internal Revenue Code of 1954. After a jury trial, he was convicted on the count relating to 1963 and acquitted on the other count. The court of appeals affirmed.

The government proved petitioner's correct taxable income by the net worth method (Pet. App. 4A). In order to prove that petitioner had a likely source of taxable income to account for his net worth increases and nondeductible expenditures, the government introduced evidence showing that petitioner had large amounts of political contributions at his disposal and that he had accepted bribes for permission to sell certain brands of liquor in the stores operated by the State liquor commission. Petitioner conceded that he appropriated $10,000 from his party's political funds, but explained that he took it in repayment of a $10,000 loan which he had advanced to the party. (Tr. 693–729, 1190–1193, 1233–1271.)

ARGUMENT

1. Petitioner urges (Pet. 6–15) that the prosecutor's references in closing argument (Pet. 7–8) to relevant evidence[1] concerning petitioner's appropriations of political funds and acceptance of bribes unduly inflamed the jury and thereby deprived him of a fair trial. Both courts below properly rejected this contention and further review is not warranted. The district court concluded that, although the public was at the time sensitive to issues involving corruption among public officials, there was not sufficient cause to "justify me in setting aside the verdict in this case" (Pet. 14). The court of appeals, citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242, noted that the remarks in question "comprise at most only about a dozen lines in approximately forty-five pages of government summation" and that these remarks are "not at all reflective of the quality of the argument as a whole" (Pet. App. 13A). It also took into account (1) the failure of petitioner's counsel to request immediate corrective instructions (Pet. App. 12A), (2) the corrective instructions which were later given in the district court's charge to the jury (Pet. App. 14A), (3) counsel's failure to make it clear that he desired further instructions (Pet. App. 14A–15A), (4) the fact that the jury acquitted on one count, indicating that it was not "diverted from its duty" (Pet.

[1] Proof of a likely source of taxable income is a usual and proper element in a so-called net worth case. See *Holland* v. *United States*, 348 U.S. 121, 137–138. Here, petitioner's counsel specifically conceded that the testimony concerning petitioner's acceptance of bribes was properly admitted (Tr. 1545–1546).

App. 15A), (5) the fact that the prosecutor was referring to relevant evidence (Pet. App. 15A), and (6) the fact that the district judge's "feel for the realities of this episode was necessarily more acute than our own" (Pet. App. 13A).

In short, since the prosecutor was entitled to bring all relevant evidence to the jury's attention, he properly attempted to rebut petitioner's assertion that his taking of party funds constituted the repayment of an alleged loan by asking the jury to conclude from the evidence that petitioner in fact simply appropriated monies to his own use, with the result that there was a taxable source for the otherwise unexplained increases in net worth. If the prosecutor did this too forcefully, the court of appeals did not err in concluding that a dozen lines of such argument, in the context of the prosecutor's argument as a whole and the district court's instructions, did not result in an unfair trial.[2]

2. Petitioner also contends (Pet. 15–23) that he was deprived of a fair trial because he did not learn, until after Brawley (the government's witness on the subject of bribes) had testified, of the names of two witnesses who, if he could have obtained their attendance, might have contradicted Brawley.[3] He relies

[2] The colloquies between the district court and the prosecutor of which petitioner complains (Pet. 10–12) occurred, as the court of appeals noted (Pet. App. 11A, n. 8), outside the presence of the jury.

[3] The record contains no support for the accusation (Pet. 16) that the government "deliberately concealed" memoranda of interviews with the two potential witnesses, if that expression is intended to mean that the prosecutor denied having any statements or memoranda of interviews (Pet. App. 8A, n. 6).

upon *Brady* v. *Maryland*, 373 U.S. 83, where this Court reversed a conviction in a murder case because the State, while turning over some of the statements of a co-defendant, withheld the co-defendant's statement that he did the actual killing.

The decision in *Brady* concerned the suppression of such information, rather than the timing of its disclosure. Neither it nor any other decision of this Court requires the government, before trial, to turn over the names of any and all witnesses who might conceivably be useful to the defense, rather than to wait until the witness to be contradicted has testified. Here, petitioner's counsel requested a pre-trial order requiring disclosure of the names of "any persons the Government knows to possess relevant information on the charges in the indictment." At a hearing on the motion, the prosecutor introduced testimony showing that petitioner had a history of attempting to intimidate witnesses (Pet. App. 9A). The district court, in a memorandum opinion denying the motion, noted that the government "concedes that in its files there are certain memoranda of interviews." The court of appeals held that the denial of the pre-trial motion was correct in view of the possibility of intimidation (Pet. App. 9A).

At the trial, Brawley testified on September 16, 1968. The defense opened its case on September 19 and the trial ended on September 25. (Pet. App. 8A.) Brawley's testimony included statements that the bribes which he assisted in paying were approved by Manning, his superior in the distilling company for which he worked, and that Turner, the company's

president, had sent the money (Pet. App. 6A–7A). From that testimony it was obvious that Turner and Manning were potential witnesses who might be useful to the defense, since they might deny any participation in bribery. Indeed, petitioner's counsel proceeded at once with efforts to have subpoenas served on them. Manning was located and the defense apparently expected to present him as a witness, but did not (Pet. App. 7A). On September 20—four days after Brawley had testified—petitioner's counsel moved for the production of any so-called exculpatory statements made by Turner (Pet. App. 7A; Tr. 1048–1049). He expressly declined to make any such motion with respect to Manning (Pet. App. 7A, n. 4; Tr. 1048). The government at once disclosed a memorandum of an interview with Turner, reflecting Turner's statement that he had, indeed, sent a check for $500 but that he had intended it as a political contribution (Tr. 1050; Pet. App. 7A).[4]

The court of appeals concluded (Pet. App. 9A–10A) that it was proper to withhold information concerning Turner and Manning until after Brawley had testified and that, although the government thereupon should have produced the Turner memorandum without awaiting a renewal of the pre-trial request, petitioner suffered no prejudice (from his counsel's delay in asking) since "Turner's relevance was disclosed by Brawley's testimony" (Pet. App. 10A). The court also noted that any testimony which Turner

[4] Counsel stated that his reason for wanting to see any such statement was to assist him in deciding whether to go to the expense of locating Turner (Tr. 1048–1049).

might have given would have had "slim exculpatory effect" since Turner could have intended the money as a political contribution but Brawley or Manning could, without his knowledge, have used it as a bribe (Pet. 10A). Finally, the court observed that petitioner's counsel had from September 16 to September 25 in which to locate or interview Turner and Manning and that he "did not request a continuance for whatever further time might have been necessary" (Pet. 9A).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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